SUPREME COURT, U. S.

FEB 11 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1000

CARMEN SANTIAGO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

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TABLE OF CONTENTS

	Page
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	3
Facts	3 - 12
POINT I: THIS SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE. THE ACCURACY AND RELIABILITY OF THE INFORMANT WAS NOT DEMONSTRATED AND THE INFORMATION WAS TOO STALE TO SUPPORT A SEARCH WARRANT	12 - 15
POINT II: THE STALENESS OF THE INFORMATION ON WHICH THIS WARRANT WAS BASED WAS NOT A REASONABLE FOUNDATION FOR ITS ISSUANCE	16 - 23
Conclusion	23
Order of Affirmance Appellate Division of the Supreme Court of the State of New York, Second Judicial Department	24 - 25

TABLE OF AUTHORITIES

	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	12
Commissioner v. Suppa 302 A.2d 357 (Pa. 1973)	18
Griffin v. State 503 P.2d 567 (Okla. 1972)	16
Mapp v. Ohio, 367 U.S. 643 (1964)	12
Maxwell v. State 193 S.E. 2d 14 (Geo. 1972)	17
McMiken v. State 192 S.E. 2d 716 (Geo. 1972)	17
People v. Mitchell 24 F.2d 952 (1969)	14
Roberts v. State P.2d 613 (Okla. 1973)	18
Sgro v. United States, 287 U.S. 206 (1932)	16
Spinelli v. Texas 393 U.S. 410 (1969)	12
State v. Marks 303 N.E. 2d 94 (Ohio 1973)	18
State v. Moreau 306 A.2d 764 (N.H. 1973)	18

Page

State v. Spencer
519 P.2d 833 (Wash. 1973) 18

Stovall v. Commissioner
189 S.E. 2d 353 (Va. 1973) 18

United States v. DiRe
322 U.S. 581,595 (1948) 16

United States v. Holiday
474 F.2d 320 (10th Cir. 1973) 16

Walker v. State
275 So. 2d 724 (Ala. 1973) 17

Wetherby v. State
482 S.W. 2d 852 (1972) 21

Windsor v. State
265 So. 2d 916 (Ala. 1972) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner, CARMEN SANTIAGO, respectfully prays that this Court issue a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 24, 1974, which affirmed petitioner's conviction rendered by a judgment of the Supreme Court

of the State of New York, County of Kings, on July 15, 1971, convicting her of Criminal Possession of a Dangerous Drug in the Second Degree; Criminal Possession of a Dangerous Drug in the Fourth Degree and Possession of a Weapon as a Misdemeanor. She was convicted after a jury trial and was sentenced to five to fifteen years in prison on the Second Degree count, seven years on the Fourth Degree count and one year on the Misdemeanor count. All of the sentences were concurrent.

The Court of Appeals of the State of New York denied leave to appeal on November 15, 1975.

JURISDICTION

Jurisdiction in this Court is invoked under Title 28, U.S. Code, Section 1257(3) and Rule 19, Subdivision 1 of the rules of this Court. The judgment sought to be reviewed is the judgment of the Supreme Court of the State of New York dated June 24, 1974, as aforesaid.

QUESTIONS PRESENTED

1. Whether a search warrant can be issued based on information supplied by a confidential informant six or seven months prior to its issuance.

2. Whether the search warrant could properly be based on informer information whose reliability was founded upon prior arrests with no reference to ultimate convictions, and observations which were highly questionable and ambiguous at best.

3. Whether on the basis of the sketcky and stale information supplied by the informant his identity should have been disclosed.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues presented are whether the petitioner's rights under the search and seizure secitons of the Fourteenth Amendment were violated.

FACTS

A suppression hearing was conducted prior to the actual trial, and STEPHEN SPINELLI testitied that he submitted an affidavit for a search warrant to Judge Murray of the Criminal Court, and obtained a warrant the same day (H 4)* The basis of the

*Numerical references prefaced by the letter "H" refer to original minutes of the Suppression Hearing. References without prefaces refer to minutes of the trial.

affidavit was information supplied by an informant who had supposedly aided in approximately fifty arrests and given information on about thirty other occasions. He allegedly told the officer that he had purchased narcotics from CARMEN SANTIAGO on numerous occasions and saw her in possession of narcotics. He also said she was engaging in the illegal sale of narcotics from her room in the Hotel St. George, where she was residing with one PETER GOMEZ (H 8-9). The officer said that he went and made a number of observations at the Hotel St. George and personally saw the premises about eighteen times in July through September of 1970, but only the last four, September 11th, 14th, 15th and 16th, were included in the affidavit (H 11-12). The information supplied by the informant was supplied at the beginning of the year, so that there is a six months hiatus between that information and the observations made by Patrolman SPINELLI. Also, though he made observations on the four dates mentioned in the affidavit, he could not say what was in any envelope he saw, he never saw CARMEN SANTIAGO and he could not detail the specific date on which he saw individuals come in and leave the room (H 14-17).

In addition, the original search warrant was never marked in evidence, the officer presenting a copy which he said was identical to the original, and the original has since been lost. The copy marked in evidence also has disappeared and none of the copies in existence contain the signature of the issuing Judge. Some erasures appear on the copies of the affidavit which the Judge identified as probably being made by him, but he could not specifically recall signing the warrant, although he said he probably did so. These facts were brought before the Court on a coram nobis application subsequent to the conviction, but the application was denied without a hearing.

At any rate, after Judge Murray signed the warrant, it was executed that night in Room 851 by the witness and other officers. There was no one in the room when they entered, but they found narcotics, a large sum of money and papers and personal possessions of CARMEN SANTIAGO. They supposedly found approximately sixteen ounces of heroin in one bag, a shoebox containing almost $5,000.00 in cash and personal effects such as clothing, wigs, bank books and surety bonds in

of CARMEN SANTIAGO (H 19-20). The room was registered to PETER GOMEZ, but there were no articles of men's clothing in the apartment (H 20-21). The officer testified that they waited in the room until CARMEN SANTIAGO came, which was about 7:30 the next morning, September 18, 1970, and they arrested her as she entered the room. She had a 38 caliber pistol which she took out of her pocketbook, and because of the scuffle that ensued, she was charged with assaulting a police officer, but was thereafter acquitted by the jury. After the arrest, the officers went down and obtained more contraband from her automobile, but the contents of the car were later suppressed (H 288-289)

SPINELLI said that the informatant had been registered for over a year, but at first he testified that he did not know his name (H 60). He was then questioned extensively about the supposed arrests the informant had helped with, six of whom were listed in the affidavit, but the officer's memory became extremely unreliable on these issues. Regarding one of the names mentioned, PATRICK BUTLER, he could not recall whether he or his partner arrested the defendant, nor who BUTLER sold to or how much he sold (H 68). He also could not recall whether BUTLER

was actually convicted. The witness also knew nothing about JOSEPH RIVERA, except to say that he made sales to undercover agents, but there, too, he did not know what was sold, when it was sold, who it was sold to or whether the man was convicted. He had no memory regarding VICTOR SOTO or ANGEL LOPEZ, and he generally could not supply any of the details with respect to the people mentioned in his own affidavit. He also admitted that it was in the early part of 1970 when he received information from the informant that CARMEN SANTIAGO was selling narcotics, and he started making his own investigation, but there is no record of it, nor did he feel it important enough to be put in his memorandum book . He never observed the hotel before July, 1970. He was never present in the area when the informant supposedly went into the hotel and there is a complete blank between receiving the information and the observations he made in July, 1970 (H 87-88). In fact, he did not even know when he actually had the conversation with the informant (H 84). When the officer was questioned about the observations he allegedly made which he listed in the affidavit, his memory was ever more

unreliable. He testified, for example, that on September 11th he saw seven addicts leave the premises but he did not know who they were, nor could he tell the Court how he knew they were addicts outside of a simple self serving statement that they were (H 93-94). The exact same meaningless information was elicited from Patrolman SPINELLI regarding the other observations he allegedly made (H 99-102). At no time did he ever see CARMEN SANTIAGO in the room, nor did he see her open or close the door (H 93-102).

Counsel requested that the identity of the informant be disclosed, but his application was denied (H 151). A further application to suppress the evidence on the basis of the fact that the witness never saw the petitioner on any occasion and that the information was stale because it was obtained in January or February of 1970, was also denied. The argument was made that the reliability of the informer had not been established, since merely listing the names of other people who may have been arrested does not establish that the information came from the informant (H 163-164).

The defense called Patrolman THOMAS JACKSON, SPINELLI's partner, and he testified that he was with

SPINELLI on the occasions when observations were made, but he could not recall seeing anyone enter or leave the apartment in question (H 173-174). The fact that seven addicts supposedly left on September 11th was information he probably got from SPINELLI when SPINELLI met him in the street. On September 14th, he again was present and again did not see anyone. The same thing was true of the 15th and 16th. He saw nothing, but any information he had in his book was a result of events related to him by his partner, Patrolman SPINELLI (H 176-179). He also testified that he did not know the informant in this case, that SPINELLI never discussed the informant with him and he did not know where SPINELLI got the information for the search warrant (H 181-182). He also could give no information about the names of the other people in the affidavit who were allegedly arrested on the informer's information (H 182).

WILLIAM TAYLOR, another police officer, said that he knew who the informant was and the witness confidentially disclosed the name to the Court (H 212). He said that he and SPINELLI used to meet the informant from time to time, but he had not seen the

informant in about a year (H 214). He said that ALBERT PINERO had been arrested for the sale of drugs, but they knew that from their own information, although the informant may have related it also (H 217-218). He verified that PATRICK BUTLER was arrested on the basis of information obtained from the informant, as well as JOSEPH RIVERA (H 219-221). He then related the events of the execution of the warrant.

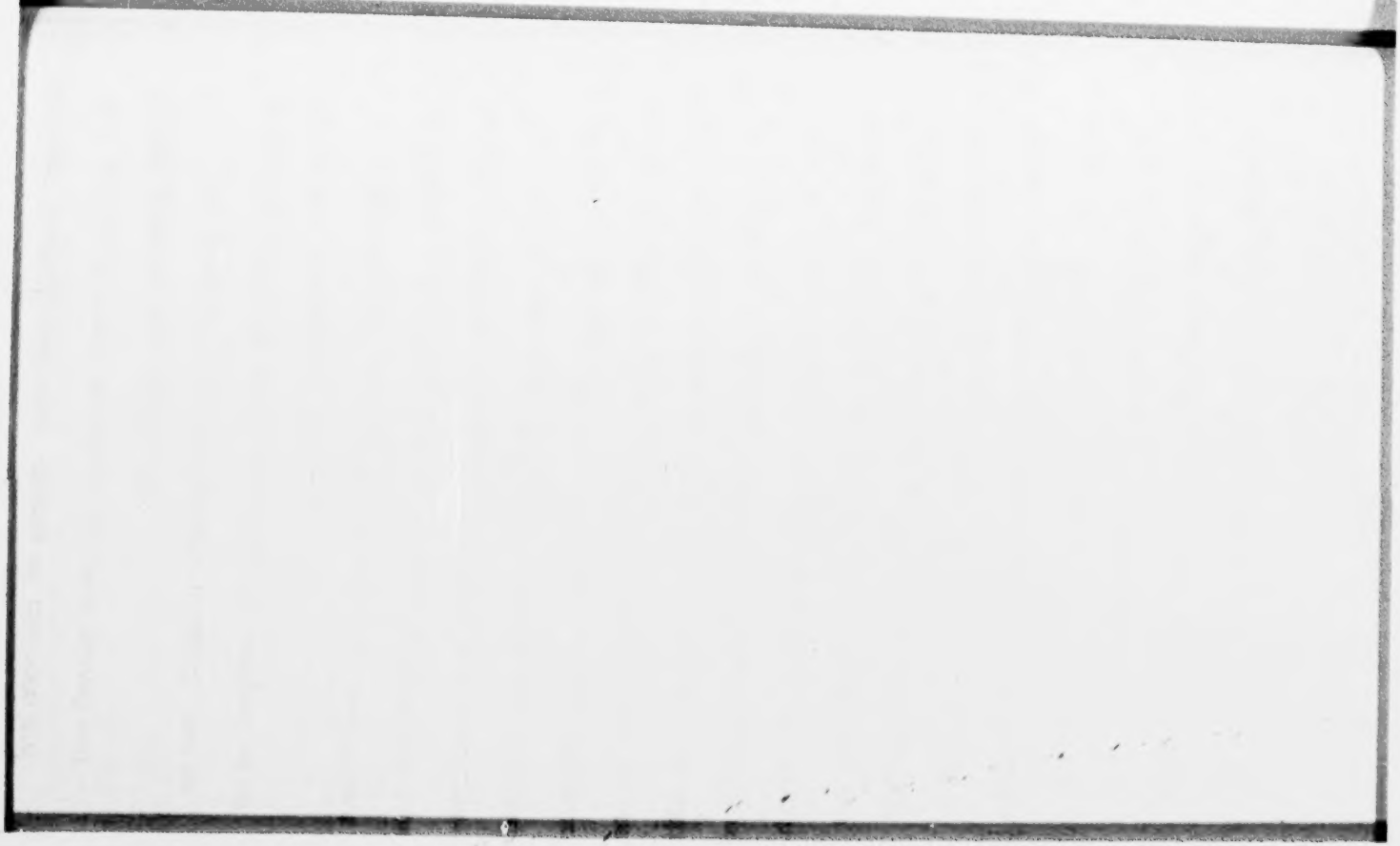
The Court denied the motion to suppress, and said that the search warrant had been validly issued. The reasons for the Court's decision were that the informant was registered and that the previous arrests supported his reliability. In addition, the information furnished allegedly was based on personal knowledge of the informant, even though that personal knowledge occurred six or seven months prior to the signing of the warrant. The Court also based its decision in part on the observations made in September (H 287), but the motion to suppress the evidence taken from the automobile was granted (H 288-289).

After a few days delay, the trial actually began on April 29, 1971, and in the People's opening, the District Attorney said that before the search,

Officer SPINELLI made observations of the room and that on six or seven occasions the door opened and CARMEN SANTIAGO was inside (30).

The first witness was STEPHEN SPINELLI, and he basically testified about executing the warrant as he had on the suppression hearing.

SPINELLI was cross examined with the same effect of showing how a long time gap existed between the time he got information and supposedly began his investigation and the time when the search warrant was executed (90-104). He also admitted that the room was registered to PETER GOMEZ and that he never checked to see if she was officially listed as the tenant (99-104). In addition, he didn't have any female wigs, women's clothing that he claimed were in the apartment when the search was made (119). It was the defense's claim that the personal effects, such as surety bonds, real estate tax bills and other documents with the petitioner's name on them were taken from the petitioner's purse when she was arrested, rather than taken from the room. In addition, all of the documents had the petitioner's address listed as one on Park Avenue rather than the Hotel St. George (125-127). In



addition, it was brought out that SPINELLI previously told the officer in Criminal Court that the revolver was in her purse, while at the time of trial he said it was in her hand when he apprehended her (134-135).

THOMAS JACKSON again testified substantially as he had on the suppression hearing (163-171), but he added that he did not see CARMEN SANGIAGO in the hotel at any time in August or Spetember of 1970 (176-177).

WILLIAM TAYLOR essentially gave the same testimony (216-234), as did SGT. PATRICK J. MALLON (246-251).

POINT I

THIS SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE. THE ACCURACY AND RELIABILITY OF THE INFORMANT WAS NOT DEMONSTRATED AND THE INFORMATION WAS TOO STALE TO SUPPORT A SEARCH WARRANT.

After this Court held that the probable cause basis for the issuance of search warrants applied to the States, Mapp v. Ohio, 367 U.S. 643 (1964), it later held that search warrants could be based on hearsay information, but that their sufficiency had to be tested by standards of credibility and reliability which made up the two prong test formulated in Aguilar v. Texas, 378 U.S. 108 (1964) and discussed at length in Spinelli

v. Texas, 393 U.S. 410 (1969). The two areas which required sufficient proof were the integrity of the information, as well as the integrity or reliability of the informant. In the instant case, it is respectfully submitted that neither prong of this test was supported by SPINELLI's affidavit or his subsequent testimony adduced at the suppression hearing. He described his source of information as a confidential informant, but the past performance of that person, the alleged arrests which seem impressive on the fact of the affidavit, is greatly weakened by SPINELLI's testimony at the hearing, since the substance of all he had to say was that certain people were arrested, but he could not recall anything about the charges against them, what they were alleged to have sold, to whom it was sold or the result of the cases against them. No mention of the disposition of any of the cases is made in the affidavit. It is an admission which rendered the use of the names in the affidavit meaningless. Of course, the issuing Magistrate did not know of SPINELLI's lack of knowledge about the circumstances of those arrests, and it is submitted that had that fact been brought out, the warrant may never have been issued in the first place. Also, any attempt to add information

about the informant by the testimony of brother officers or by the observations made, which were not included in the affidavit, cannot satisfy the requirement of the law. It is impermissible at a suppression hearing to supply facts claimed to have either been given the issuing Judge when they were not recorded under oath or which were entirely missing on the occasion the search warrant was first applied for. People v. Mitchell, 24 F. 2d 952 (1969). The fact that the people mentioned in the affidavit may have not been convicted was not made known to the issuing Judge and the reliability of the informer was never established.

In addition, the third paragraph of the affidavit tends to indicate that the nature of the information given by the informant was direct knowledge, since he said he purchased narcotics from CARMEN SANTIAGO and observed her in possession of narcotics as well. It is curious that in Paragraph 3 there is absolutely no mention of the time when the informant allegedly made these observations, an omission which can only be considered intentional in view of the later testimony of the officer. When one reads the affidavit in connection with Paragraph 4, describing observations made in September, 1970, it creates the impression

that the information supplied was around that time and was within a short time before the warrant was issued. Certainly, the conclusion may have been drawn by the Judge when issuing the warrant, a conclusion which was based on facts not true and probably intentionally misleading on the part of the police officer.

Certainly, at the time Officer SPINELLI made the arrest he knew that the lapse of time he received information from that informant was six or seven months before he tried to get a warrant, but he did not mention that fact in his application. The fact that this great time lapse came out on the suppression hearing establishes that the officer was less than candid with the issuing Magistrate. Even the other officers could not relate information given past February or March of 1970, at least six or seven months prior to the warrant being issued. Because of the staleness of the information, there was no basis upon which Judge Murray could have found probable cause had he know that such a great discrepancy in time existed.

POINT II

THE STALENESS OF THE INFORMATION ON WHICH THIS WARRANT WAS BASED WAS NOT A REASONABLE FOUNDATION FOR ITS ISSUANCE.

This Court addressed itself to the issue of staleness more than forty years ago, Sgro v. United States, 287 U.S. 206 (1932), when it held that the facts proven must be closely related to the time of issuance of the warrant in order to justify the existence of probable cause by the issuing Court. The time gap in that case was much longer than at bar. The test of a search warrant is the fullness of proof presented to the issuing Judge at that time, without reference to unpresented proof as to what the warrant ultimately discovers. United States v. DiRe, 322 U.S. 581,595 (1948). It has also been held that where an allegation was presented that an informant actually saw narcotics, the failure to set forth the date when the observarion was made made the affidavit worthless, since remoteness would be a defect in the establishment of probable cause. Griffin v. State, 503, P.2d 567, (Okla. 1972). Unless one can really deduce the date from a reading of the affidavit, United States v. Holiday, 474 F.2d 320 (10th Cir. 1973), if no hint

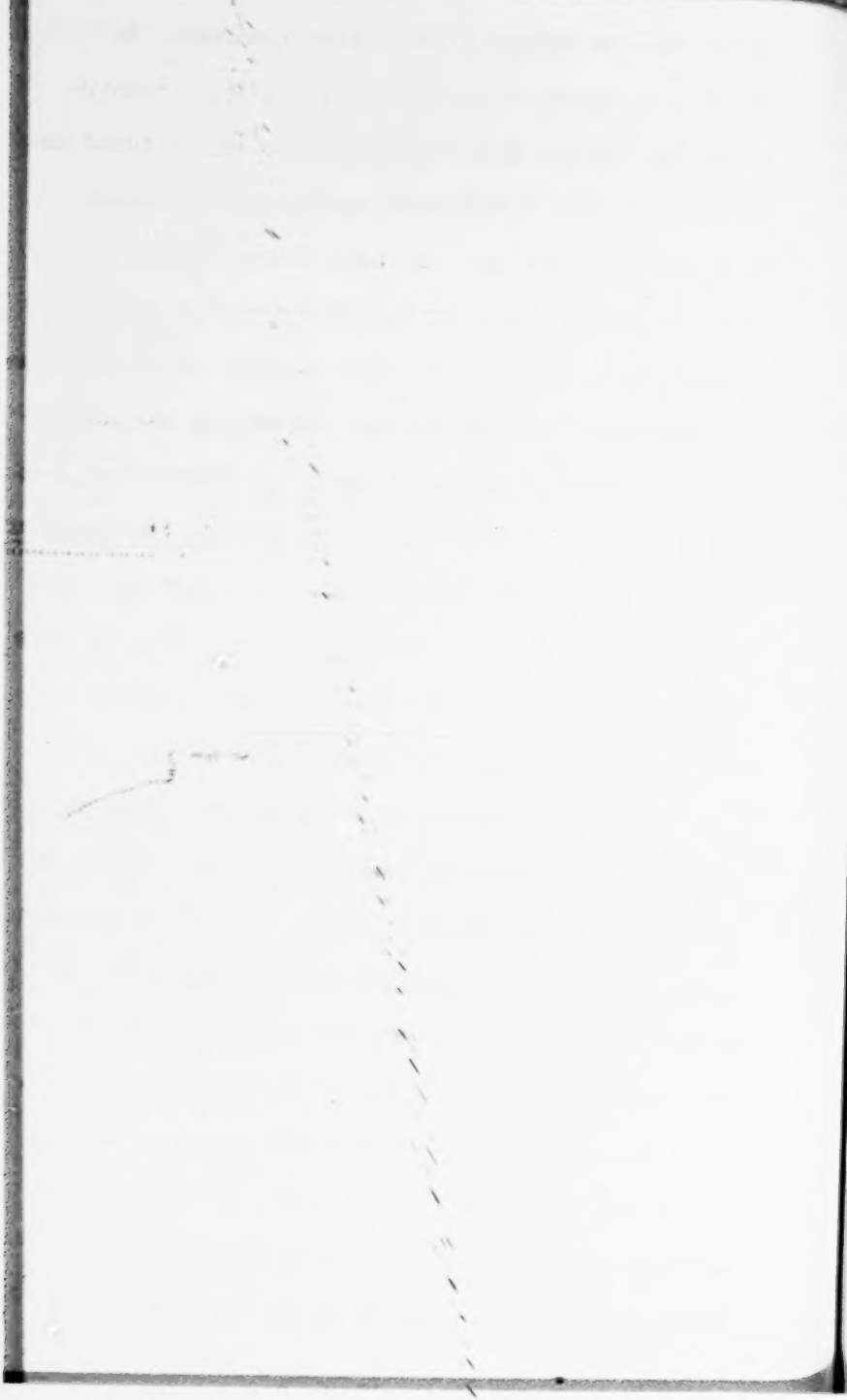
or clue can be found in the papers, the warrant must fall. McMiken v. State, 192 S.E. 2d 716 (Geo. 1972); Windsor v. State, 265 So. 2d 916 (Ala. 1972); Maxwell v. State, 193 S.E. 2d 14 (Geo. 1972): Walker v. State, 275 So. 2d 724 (Ala. 1973).

If any time can be assumed from a reading of the affidavit in the instant case, it would be a time substantially co-existent with the time of the observations detailed in Paragraph 4, September, 1970, when the fact was developed that the time period really was in January or February of that year. The result is that the entire basis for the issuance of the warrant in this case must fall. This case does not even come within that of leaving out dates, but using present tense descriptive words, since the information in this case was so stale. The staleness doctrine was developed to make sure that search warrants were issued only on the basis of continuing probable cause, since the requirement of constancy cannot be read to mean that once some probable cause is established a person can be subjected to a Court ordered search at any time without limit.

Many cases have struck down searches where time has passed, although each case really turns on its own

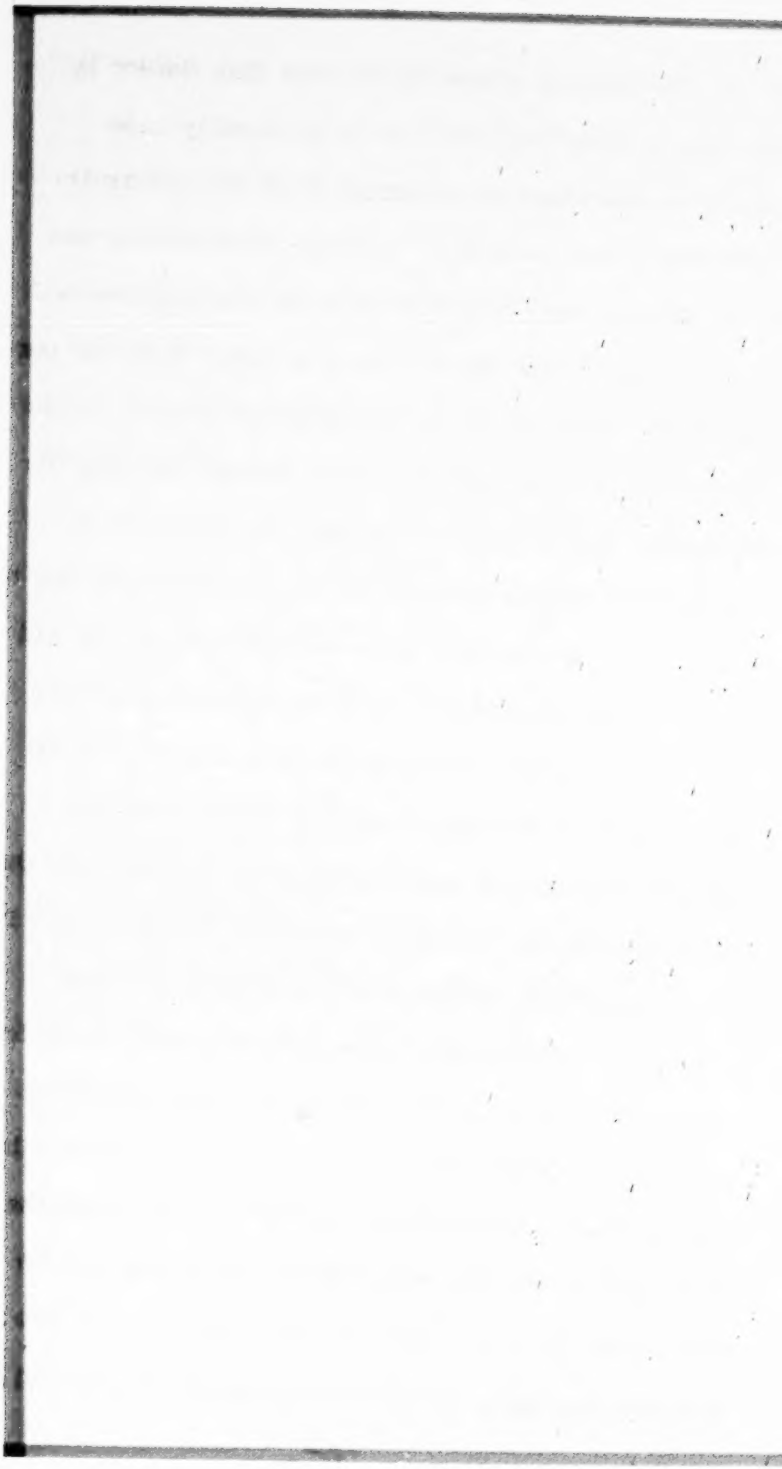
facts and the nature of the c rime involved. In Roberts v. State, P. 2d 613 (Okla. 1973), a twenty-three day gap was insufficient, since it was found to be unlikely that a defendant would retain possession of a stolen credit card for such a long time. Likewise, in a fact situation generally related to the present case, evidence of the possession of drugs on one occasion would not support the issuance of the search w arrant where the possession occurred seventy-two days before the warrant was issued. Stovall v. Commissioner, 189 S.E. 2d 353 (Va. 1972). In State v. Spencer, 519 P.2d 833 (Wash. 1973) a warrant was no good where sale of narcotics was made seventy-eight and sixty-one days before. However, in State v. Moreau, 306 A.2d 764, (N.H.1973) a warrant was susceptible after an eight day lapse between its issuance and the time the informant said he purchased narcotics. A sixteen day lapse in a numbers paraphernalia case was held to be fatal where the fact pattern was exceptionally weak. Commissioner v. Suppa, 302 A.2d 357 (Pa. 1973).

The case at bar does not even closely resemble any of the cases where the issuance of the warrants had been upheld, since the length of time is an extraordinary one. State v. Marks, 303 N.E. 2d 94



(Ohio 1973) held that another factor to be considered was the length of time that the police held the information before making the search warrant application. Of course, in this case, only Officer SPINELLI got the information. There are absolutely no logical reasons put forth why he waited six months before beginning to make observations. He could have applied for the search warrant in March or April, the time when the possibility of coming up with something was much greater. He merely testified that he was investigating the matter during the six months, but he did not consider it even important to make notes in his memorandum book, nor did he tell anyone of the existence of this investigation. His waiting from February or March until September is completely unreasonable, and no justification is given for it. It seems that to uphold the search warrant in this case would require consideration of all of the facts and circumstances, one of which was the establishment of a good reason for holding the information for such a long time before something further was done.

The officer attempted to cure this defect by mentioning four observations he apparently made which he described in Paragraph 4 of the affidavit. The only thing he said about these observations was that persons were observed to enter the premises and after a short time leave. He also added that the persons were known to him to be narcotics users. It is respectfully submitted that this attempt to cure the defect is meaningless, since when he testified at the trial, Officer SPINELLI could not establish how he knew any of the persons were narcotic users. He did not know who the addicts were, he made no notations as to their names and could not even explain how he knew they were narcotic users (H 87-94). He did not know who opened the door, nor did he ever see the petitioner on any of these occasions (H 101-103). In addition, fellow officers who were with him when these observations were made could not even ocrroborate his story in that he saw anyone on these occasions. Patrolman JACKSON said he did not see any addicts leave the apartment (H 173-174). but that he received the information from Officer SPINELLI when they met in the street (H 174). This is true about all of the observations made on the various dated (H 176-179).



Of course, Officer SPINELLI admitted that he did not see petitioner at the premises on any of the dates of his four so-called observations (H 99-101). He admitted that what occurred on those dates was merely within his own memory and the affidavit was made based upon his recollection of the facts rather than any kind of substantial investigation. This is not even a situation where facts which may be in and of themselves be insufficient can together form a proper basis for the execution of a warrant. The informant information was so stale that as a matter of law it could not support probable cause, and the observations made were not susceptible of any reasonable interpretation supporitng the information, since they were completely ambiguous.

In Wetherby v. State, 482, S.W. 2d 852, (1972), a conviction was affirmed where the informant's reliability appeared in the affidavit and where he detailed that he had seen a sale of narcotics within forty-eight hours.

In the instant case, the tests which were made in Wetherby are not even remotely approached. Firstly,

there is no recent history, but in fact a long out-dated one and the observations made did nothing to reactivate the old information. Secondly, there is not even a substantial suggestion in the affidavit that the information is reliable, since nothing is explained about the six arrests mentioned, and in fact, the hearing showed that the informant is an addict, a fact which tends to weaken his reliability, and Officer SPINELLI knew nothing of substance about the six cases he mentioned. It is also suggested that the suppression issue takes on an added importance in the case at bar, since the case is a close one on its facts. Obviously, the entire prosecution was based on SPINELLI's testimony with regard to the fact that CARMEN SANTIAGO occupied the apartment in question. It was shown that the apartment was registered to one PETER GOMEZ, and nowhere did the prosecution prove that she had custody and control of this apartment. The attorney attempted to argue that the People failed to produce any witnesses from the hotel to say that petitioenr had something to do with the apartment, but the Court would not let him

make that very reasonable argument (329-336). Also, the defense obviously claimed that the material with petitioner's name on it, such as bank books, surety bonds, driver's registration and other documents, were found in her purse rather than in the apartment, as SPINELLI claimed. Opposing views, either of which could have been accepted by the jury.

When one considers the quantum of all of the evidence against appellant, it can certainly be suggested that it was not overwhelming, and in the light of the severity of the sentence herein, five to fifteen years in prison, the probable cause requirement for the search warrant becomes more critical.

CONCLUSION

THE WRIT OF CERTIORARI HEREIN PRAYED FOR SHOULD BE GRANTED.

Respectfully submsitted,

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At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 24, 1974.

HON. J. IRWIN SHAPIRO) Acting Presiding Justice,
HON. JOHN P. COHALAN, JR.) Associate Justices
HON. ARTHUR D. BRENNAN)
HON. A. DAVID BENJAMIN)
HON. FRED J. MUNDER)

- - - - - - - - - - - - - - - - X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CARMEN SANTIAGO,

Appellant.

Order on Appeal from Judgment of Conviction

- - - - - - - - - - - - - - - - - - X

In the above entitled action, the above named CARMEN SANTIATO, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered July 15, 1971; and the said appeal having been submitted by STANLEY M. MEYER, Esq., of counsel for the appellant, and submitted by MARTIN I. SAPERSTEIN, Esq., of counsel

for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereot, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Jurisdiction	3
Statement of Facts	3
ARGUMENT:	
POINT I - THE RELIABILITY OF THE INFORMANT AND THE ACCURACY OF HIS INFORMATION WERE CLEARLY STATED ON THE FACE OF THE AFFIDAVIT.	12
POINT II - THE INSTANT WARRANT WAS NOT BASED ON STALE INFORMATION.	17
CONCLUSION - FOR THE AFOREMENTIONED REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.	23
APPENDIX	

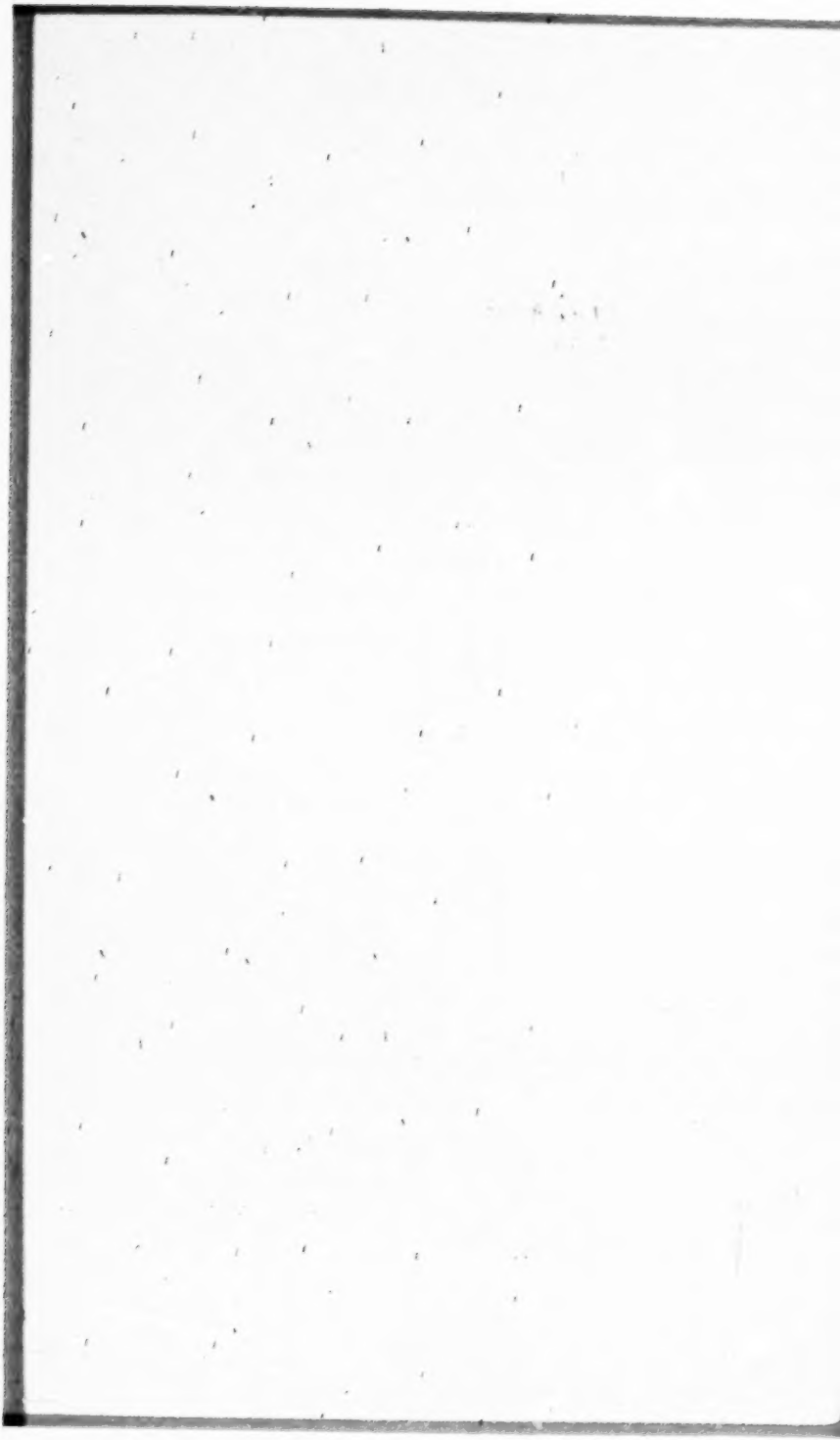


TABLE OF AUTHORITIES

Cases

	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	12
Albitez v. Beto, 465 F. 2d 954 (5th Cir. 1972)	16
Bastida v. Henderson, 487 F. 2d 860 (5th Cir. 1973)	19
Brinegar v. United States, 338 U.S. 160 (1949)	15
Draper v. United States, 358 U.S. 307 (1959)	16
Durham v. United States, 403 F. 2d 190 (9th Cir. 1968), vacated on other grounds, 401 U.S. 481 (1971)	19
Jones v. United States, 362 U.S. 257 (1960)	16
Rider v. United States, 355 F. 2d 192 (5th Cir. 1966)	20
Rosencranz v. United States, 356 F. 2d 310 (1st Cir. 1966)	20
Sgro v. United States, 287 U.S. 206 (1932)	18
Spinelli v. United States, 393 U.S. 410 (1969)	12,13
United States v. Boyd, 422 F. 2d 791 (6th Cir. 1970)	20

	Page
United States v. Comissiong, 429 F. 2d 834 (2d Cir. 1970)	16
United States v. Conti, 361 F. 2d 153 (2d Cir. 1966), vacated on other grounds, 390 U.S. 204 (1968)	21
United States v. Harris, 403 U.S. 573 (1971)	15,18,21 12,13,14
United States v. Harris, 482 F. 2d 1115 (3d Cir. 1973)	19
United States v. Johnson, 461 F. 2d 285 (10th Cir. 1972)	19
United States v. Neal, 500 F. 2d 305 (10th Cir. 1974)	19
United States v. Unger, 469 F. 2d 1283 (7th Cir. 1972)	20
United States v. Ventresca, 380 U.S. 102 (1965)	19

Statutes

28 U.S.C. Sec. 1257(3)	3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1000

CARMEN SANTIAGO,

Petitioner,

-against-

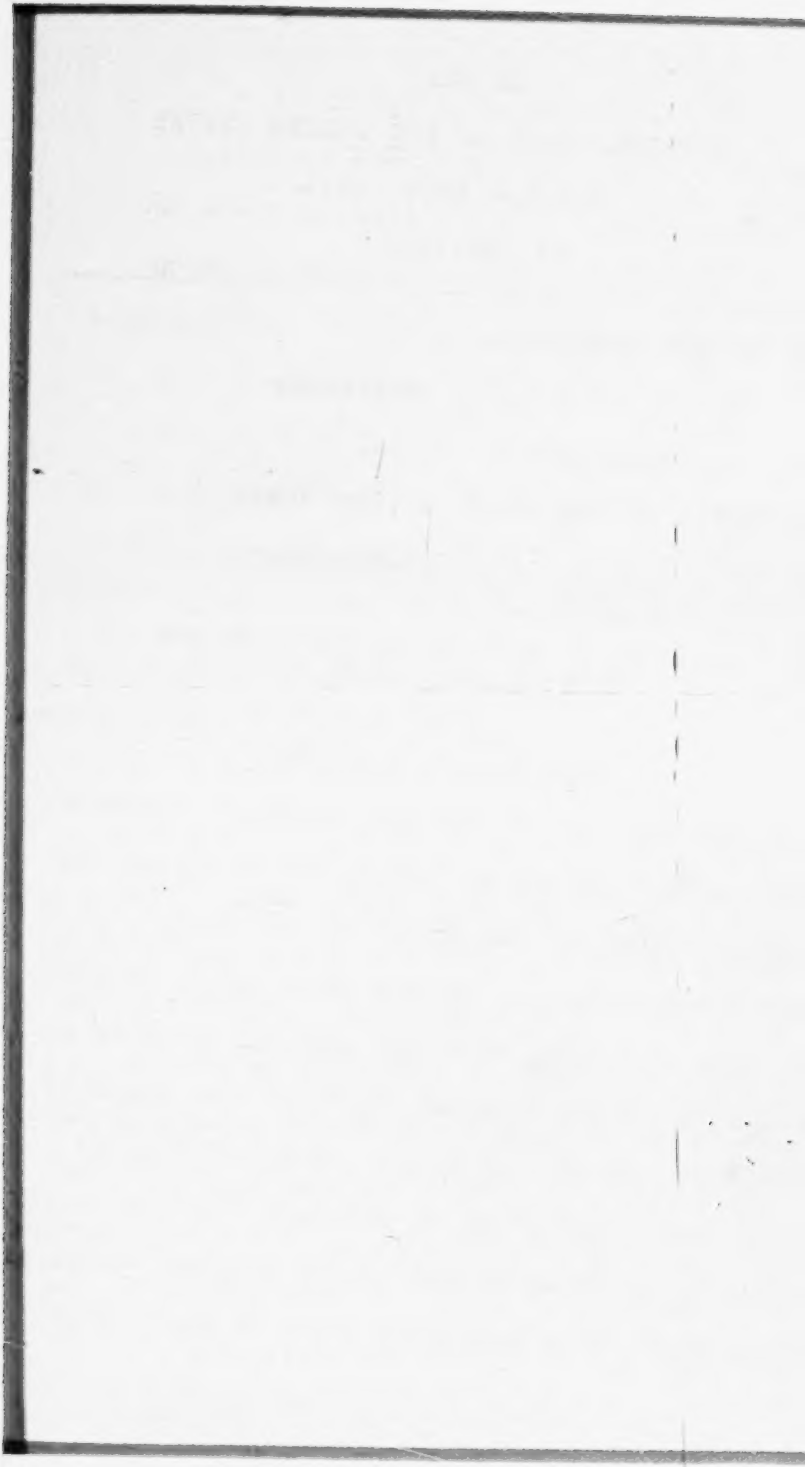
THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Carmen Santiago, seeks a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, which, on June 24, 1974, affirmed without opinion a judgment of the Supreme Court of the State of New York, County of Kings, rendered July 15, 1971, convicting her of Criminal Possession of a Dangerous Drug in the Second Degree; Criminal Possession of a Dangerous Drug in the Fourth



Degree and Possession of a Weapon as a Misdemeanor. She was sentenced to a term of imprisonment of five to fifteen years on the Second Degree count, a maximum of seven years on the Fourth Degree count, and one year on the Weapon count, said sentences to run concurrently. Leave to appeal to the Court of Appeals of the State of New York was denied on November 15, 1974.

By Kings County Indictment No. 4236/1970, the petitioner was charged with Assault in the Second Degree, Criminal Possession of a Dangerous Drug in the Second and Fourth Degrees, and Criminal Possession of a Dangerous Weapon as a Misdemeanor. On April 19th and 20th, 1971, a hearing both to controvert a search warrant and to suppress evidence was held. The motion to controvert was denied, while the motion to suppress was granted in part and denied in part. On May 5, 1971, a jury trial was held and the petitioner was found guilty of the above, except for the Assault charge. On July 15, 1971, the petitioner was sentenced as aforesaid.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) and Rule 19, subdivision 1 of the rules of this Court.

STATEMENT OF FACTS

At the hearing to controvert and suppress, PATROLMAN STEPHEN SPINELLI testified that during September, 1970, he was assigned to the Narcotics Division to investigate illegal narcotics activity. On September 17, 1970, at approximately 8:30 p.m., the witness submitted a search warrant and affidavit to Judge Murray of the Brooklyn Criminal Court, who signed the warrant (H4).* In connection with the affidavit for the warrant, the witness received confidential information from a registered police informant who had previously given the witness information concerning narcotics activities on thirty separate occasions. The witness then gave five specific instances where information given by

* Numbers in parentheses preceded by the letter "H" refer to pages of the minutes of the hearing.

the informant led to arrest, indictment, and conviction of five individuals for narcotic activities. These individuals were listed in the affidavit accompanying the instant search warrant (although the appellant does not include it, the respondent will provide the court, in the appendix, with the relevant portions of the affidavit under attack on appeal) (H5-8).

Concerning appellant, the registered informant informed the witness that he observed appellant selling narcotics and in possession of large quantities of narcotics both in the Hotel St. George, room 851, and on the street. As a result of this information, the witness went to the Hotel St. George and made eighteen observations of room 851 from July 17, 1970, to September 16, 1970, at all hours of the day and night. The affidavit listed four observations, September 11, 14, 15, and 16, 1970. During those September observations, the witness observed individuals standing around the door of 851. Thereupon appellant would open the door,

hand the individual a brown paper bag, and appellant, in turn, would receive money from the individual (H9-16). The witness was also involved in a prior arrest of appellant in October, 1969, involving illegal narcotic activities in the Hotel St. George.

The warrant was executed by the witness and three fellow officers in the Narcotics Division at approximately 10 p.m. on September 17, 1970. The hotel manager opened the door to room 851 and a search of the room ensued. In appellant's closet, in her bag, was found a quantity of heroin and all kinds of narcotic implements and cutting devices. Also found in a shoe box was nearly $5,000 in cash. Besides this contraband, the police also recovered items and articles of personal property all bearing appellant's name. The room, however, was registered to a "Peter Gomez" who was also named in the warrant, but there was no evidence of a male living in the room. Nor was this individual ever seen entering or leaving the room (H18-21).

After searching the room, the police waited for appellant's return. This came to pass at about 7:30 a.m. the following morning. At that time, the witness observed appellant from the hotel window park her car and enter the hotel. A few minutes later, the witness heard a key go into the door, the door opened; appellant had her hand in her pocketbook and as the witness and his partner attempted to grab her, the pocketbook fell to the floor and appellant had a .38 caliber gun in her hand. The officers grabbed the gun and it was found to be loaded (H31-35). The pocketbook was recovered and heroin and cocaine were found within (H39). (Heroin was also found in appellant's car but the court ultimately ordered these narcotics suppressed.)

Appellant was placed under arrest and was put into the witness' car. As the witness was driving to the precinct, he observed appellant through the rear view mirror adjusting her blouse and pants and "when she made a move

toward the window . . .", ostensibly to throw a cigarette out, "I hit the brake of my car and grabbed her hands, and I obtained a small package, a plastic envelope, containing alleged cocaine" (H41).

The return of the search warrant was made on September 30, 1970, before Judge Murray (H42).

Upon cross-examination, the witness stated that he first learned that appellant was involved in narcotics and was a wholesale supplier in Brooklyn in 1969 (H45-46). Concerning the observations, Patrolman Taylor, the witness' partner, was not allowed near room 851 as appellant knew him (H56). As to the informant, the witness could not recall the date of the conversation but it was months before the arrest (H58). The last time the witness saw the informant was during the summer of 1970 (H59).

The witness was then questioned about the names of the arrested individuals listed in the affidavit and it was noted that although these individuals were subsequently convicted for narcotic sales to undercover police officers, the

fact that they were convicted was not mentioned in the affidavit (H65-70-b).

The first time the informant told the witness about appellant's narcotics operation was in the early part of 1970. The informant was in the room with appellant maybe seven times and the informant is himself an addict (H79). Concerning paragraph 3 of the affidavit, the informant told the witness that he and others purchased drugs from appellant in room 851 of the Hotel St. George (H85). Again the witness could not recall the exact date of this conversation except that it occurred during the early part of 1970 (H87). After receiving this confidential information, the witness initiated a "questioning investigation, just checking around" (H88). However, actual observations of the subject room commenced during July, 1970 (H89).

The questioning turned to the witness' observation. On September 11, 1970, the witness observed seven addicts known to him from the 76th Precinct area, enter and leave room 851 (H91).

During this period, the witness observed appellant open the door (H96,99). On September 14, 15, and 16, 1970, five addicts were seen entering and leaving the room. However, the total individuals known to the witness was nine (H99,101-102). The witness also had information that others were working for appellant, "dealing" on the street (H103). Concerning the search of the room, when the room was searched, only female clothing was found (H156).

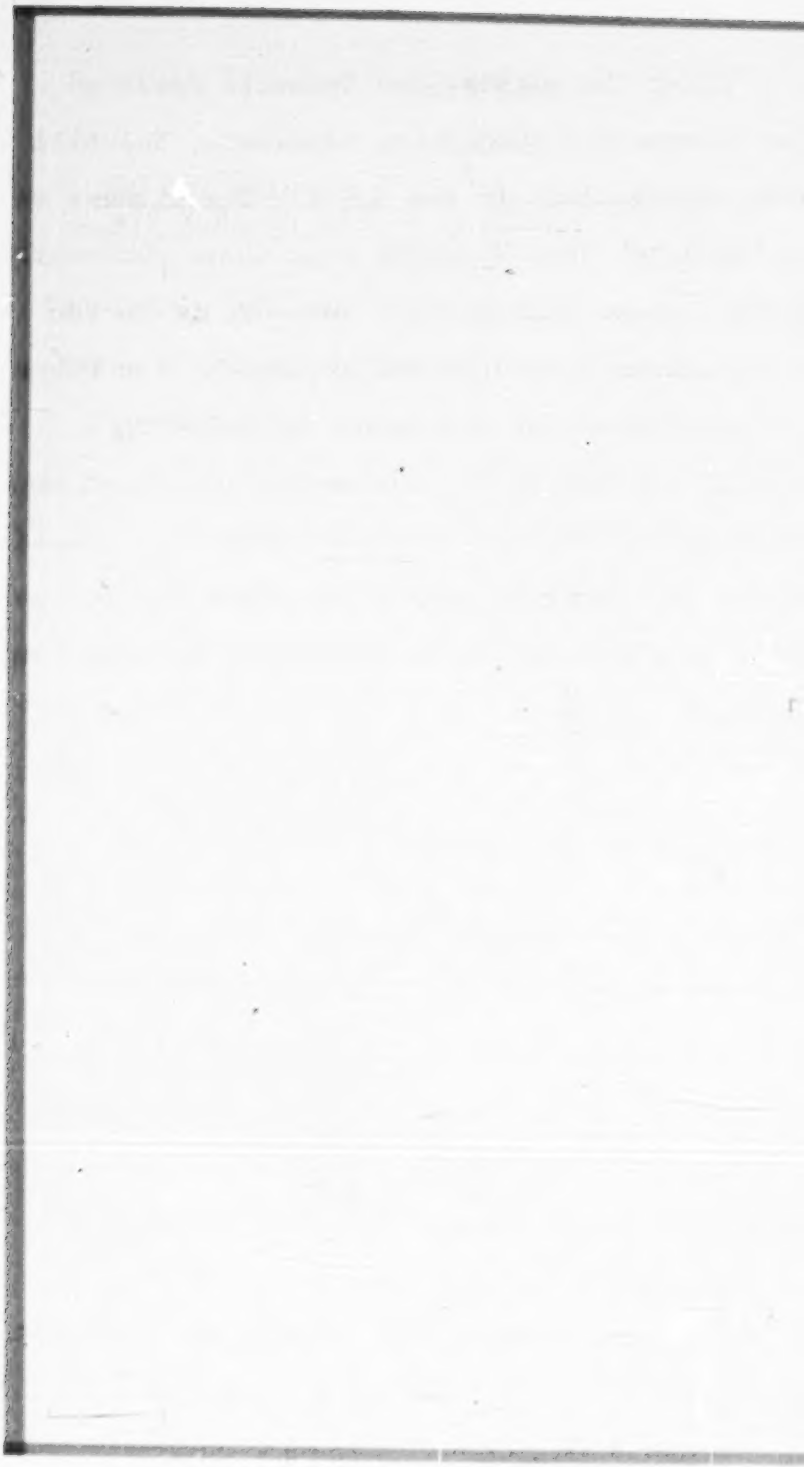
PATROLMAN THOMAS JACKSON was called as a defense witness and stated that since September, 1970, he was Spinelli's partner. When the questioning turned to the observations made by Spinelli on September 11, 1970, the witness stated that, "Patrolman Spinelli and I never stayed together really on the observations" (H172). The witness, however, was on the eighth floor but he had no independent recollection of anyone entering or leaving room 851 (H173). However, his notes indicated that he and Spinelli observed addicts leaving the room on various dates (H174,176,178). Further, during those

dates, the witness observed appellant in the lobby of the hotel in the morning (H179). Concerning the execution of the warrant, the seizing of the narcotics, the apprehension of appellant with her gun, and the recovery of the narcotics in her pocketbook, the officer's testimony was substantially that of Patrolman Spinelli.

PATROLMAN WILLIAM TAYLOR was called as a defense witness and stated that prior to September 17, 1970, he worked with Patrolman Spinelli on this case and was present in early 1970 when Spinelli had a conversation relating to narcotics with the informant concerning appellant (H209-210). Further, the witness knew appellant (H211). The questioning then turned to that portion of Spinelli's affidavit where the individuals arrested as a result of the informant's information were listed. It was brought out that these individuals were arrested and charged with crimes involving dangerous drugs. The arrests were effected by the witness and Spinelli (H211-228).

After the witness and Spinelli received the information concerning appellant, Spinelli made observations in the hotel. The witness was in the hotel when Spinelli made these observations (H230). More than likely, however, as to the observations listed in the affidavit, the witness was not present at the hotel (H237-238).

At the hearing's conclusion, the court made findings of fact and concluded that the reliability of the informant was shown and there was probable cause on the face of the affidavit for a warrant to issue.



ARGUMENT

POINT I

THE RELIABILITY OF THE INFORMANT AND THE ACCURACY OF HIS INFORMATION WERE CLEARLY STATED ON THE FACE OF THE AFFIDAVIT.

The law is well settled, and the petitioner does not contest, that an affidavit for a search warrant may be based on hearsay and need not reflect the personal observations of the affiant. When such a situation obtains, however, the affidavit must meet the two-prong test first laid down by this Court in Aguilar v. Texas, 378 U.S. 108, 114-15 (1964), and expounded upon in Spinelli v. United States, 393 U.S. 410 (1969), and United States v. Harris, 403 U.S. 573 (1971).

The test of Aguilar requires that the magistrate be able to conclude, from the face of the affidavit, both that the affiant's informant was credible and that his information was reliable. Respondents respectfully submit that the affidavit in question provided a more than ample basis for such a conclusion.

Taking the second prong first, the affidavit clearly stated that the informant observed the

petitioner in possession of narcotics and further observed the petitioner sell narcotics on various occasions. Such personal observation on the part of the informant obviously provides the greatest assurance that the information is in fact reliable, and has been previously considered by this Court to be sufficient. Spinelli v. United States, supra, 393 U.S. at 415; United States v. Harris, supra, 403 U.S. at 581. Petitioner's position on this point is apparently inconsistent: at first she asserts that the second prong of the Aguilar test was not met, but then appears to concede that the "nature of the information given by the informant was direct knowledge." Petitioner's Brief, pp. 13-14. Respondents submit that the second prong of the Aguilar test was clearly satisfied.

The first prong of the Aguilar test requires the affidavit to contain sufficient allegations to enable the magistrate to conclude that the informant was credible. The petitioner, in denying the propriety of the magistrate's conclusion, focuses upon the failure of the affidavit to allege that the arrests to which

the informant's prior information had led resulted in convictions. In so doing, the petitioner completely ignores the informant's clearly stated declarations against penal interest. Respondents submit that such declarations, even standing alone, were a sufficient indication of the informant's reliability, and that the other information - although unnecessary - simply provided additional indicia of reliability.

In the case at bar, the unnamed informant stated to the affiant that "he has purchased narcotics from [the petitioner] on numerous occassions [sic]." Such declarations against penal interest have been held by this Court to be sufficient, in and of themselves, to support a finding of the informant's credibility. United States v. Harris, supra, 403 U.S. at 583-84. In Harris, the informant had stated that he had purchased illicit whiskey from the defendant for a period of more than two years. Respondents submit that the present case is plainly controlled by United States v. Harris, supra, and that the

first prong of the Aguilar test has been thereby satisfied.

Even on its own terms, the petitioner's argument that the failure of the affidavit to allege that the informant's information led to convictions and not merely arrests made improper the finding that the informant was credible is without merit.

In considering such preliminary determinations as probable cause, this Court has emphasized that "we deal only with probabilities that 'are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" United States v. Harris, supra, 403 U.S. at 582-83, citing Brinegar v. United States, 338 U.S. 160, 175 (1949).

On such a basis, it seems clear that averments that prior information led only to arrests would be sufficient. First, a conviction may be precluded by factors unrelated to the validity of the informant's information. Second, such an averment would seem to provide a greater indication of reliability than would the mere

allegation that the informant had previously given correct or accurate information; yet such an allegation has been considered sufficient by this Court. See Jones v. United States, 362 U.S. 257, 268 n.2 (1960); Draper v. United States, 358 U.S. 307, 309 (1959). Finally, a police officer would not, as a practical matter, continually rely on the information from an informant which turned out to be false. Yet here the affiant relied on the informant's information at least six times. The lower federal courts which have considered the question have rejected the petitioner's argument. See United States v. Comissiong, 429 F. 2d 834, 835-36 (2d Cir. 1970); Albitez v. Beto, 465 F. 2d 954 (5th Cir. 1972).

In sum, the informant was shown to be credible and his information reliable.

POINT II

THE INSTANT WARRANT WAS NOT BASED ON STALE INFORMATION.

The petitioner argues that the warrant in the case at bar was based on stale information because the critical conversation between the affiant and the informant occurred about six months prior to the affiant's initial observations, and about nine months prior to the date the search warrant was issued. The petitioner further argues that the instant affidavit was insufficient on its face, because the date of that conversation was omitted therefrom. Respondents respectfully submit that, whatever the validity of these arguments considered in vacuo, they are without merit on the facts of this case, because of the clear evidence from which the magistrate could reasonably have concluded that the petitioner's illegal activities continued unabated until the time the search warrant was executed.

This Court first addressed the question of staleness over forty years ago, when it was held that the facts alleged in the affidavit must be

"so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). This does not mean, however, that information which may be several months old is totally irrelevant. On the contrary, it will certainly be at least relevant so long as it tends to indicate a present probability of illegal activities when considered in conjunction with more recent information. This Court has so held. United States v. Harris, supra, 403 U.S. at 579 n.*.

It can hardly be disputed the search warrant could properly have issued had it been sought shortly after that conversation between the affiant and the informant. How much of a delay in making the application would have been permissible - that is, how long after that conversation a magistrate could properly have found present probable cause relying solely thereon - is debatable. Respondents submit that the distinction drawn by the lower federal courts between allegations which indicate a continuing offense and those which indicate merely an isolated incident,

insofar as permissible delay is concerned, is eminently reasonable, and plainly heeds the injunction of this Court to interpret affidavits for search warrants in a "commonsense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 108 (1965). Compare Bastida v. Henderson, 487 F. 2d 860, 864 (5th Cir. 1973); United States v. Johnson, 461 F. 2d 285, 287 (10th Cir. 1972); and United States v. Harris, 482 F. 2d 1115, 1119 (3d Cir. 1973), with United States v. Neal, 500 F. 2d 305, 309 (10th Cir. 1974); and Durham v. United States, 403 F. 2d 190, 194-95 (9th Cir. 1968), vacated on other grounds, 401 U.S. 481 (1971).

The information from the informant leads clearly to the conclusion of a continuing violation. But, the petitioner will argue, the date of that conversation was omitted from the affidavit, and a narcotics operation such as the one conducted by the petitioner could hardly be presumed to continue indefinitely.

With that, Respondents will agree. We will not argue to this Court that the petitioner's

narcotics operation could reasonably be thought to continue indefinitely, or even for six or nine months. We would respectfully concede that the warrant would have been invalid had it been based solely on a nine-month-old conversation. However, Respondents would submit that, on the facts of this case, the failure to include the date of that conversation in the affidavit was not fatal, and that the petitioner's narcotics operation was shown to have continued up until the date of the warrant's issuance, by virtue of the affiant's observations.

The question of whether a warrant is invalidated by the omission from the supporting affidavit of the date of the conversation between the affiant and the informant is one that has divided the lower federal courts. Some hold it invalidates the warrant. See Rosencranz v. United States, 356 F. 2d 310, 315-17 (1st Cir. 1966); United States v. Boyd, 422 F. 2d 791, 793 (6th Cir. 1970). Others hold that it does not. See Rider v. United States, 355 F. 2d 192, 193 (5th Cir. 1966); United States v. Unger, 469 F. 2d 1283, 1287-88 (7th Cir. 1972);

United States v. Conti, 361 F. 2d 153, 156 (2d Cir. 1966), vacated on other grounds, 390 U.S. 204 (1968). We submit that this question need not be reached in the case at bar because, regardless of the date of that conversation, the affiant's own observations indicated a present probability of illegal activity.

On various dates, the affiant observed persons known to him to be drug addicts enter the petitioner's premises and exit after a short time. These observations are entirely consistent with the notion that these persons went to the premises for the purpose of purchasing narcotics and, having completed their transactions, left immediately. Respondents respectfully submit that it was therefore proper for a magistrate, concerned only with a balancing of probabilities, to conclude that the petitioner's continuing illegal operation was still being conducted, and that there was - at that time - a reasonable basis for a search. Cf. United States v. Harris, supra, 403 U.S. at 579 n.*.

The petitioner's effort to impeach the affiant's statements in this regard is, at this

point, unavailing. The hearing court, who had the opportunity to observe the demeanor, and evaluate the credibility of the affiant, fully credited his statements. It would be inappropriate for this Court to now determine otherwise.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
March, 1975

Respectfully submitted,

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